86-560

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 198
* * * * *

Edward L. Odum,
Petitioner
v.
United States Patent &
Trademark Office,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Edward L. Odum
115 E. DeYoung
Marion, Ill. 62959
618 993-3969

The Petitioner is proceeding pro se,
without counsel

Questions Presented

1. Whether the Petitioner's particular mark "Mr. Chocolate" is entitled to be registered the same as dozens of other trademarks that use the popular symbol "Mr." to precede food products of all sorts.

2. Whether the Petitioner must forego his Constitutional Right to protect his particular trademark against the possible emergence of other marks called "Mr. Chocolate".

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 198
* * * * *

Edward L. Odum,
Petitioner
v.
United States Patent &
Trademark Office,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered in this proceeding on February 12, 1986.

PREFACE

On December 17, 1979 the Petitioner filed an application to register the singular mark "Mr. Chocolate". In October of 1980 the Petitioner received a communication from an Examiner, Mr. Robert C. Clark by name, stating that in his opinion the mark resembled a registered mark called "Miss Chocolate" too much to be considered suitable for registration.

The Trademark Office registers thousands of marks that are spelled and pronounced exactly alike. Clusters of identical marks such as "Mr. Apple", "Big Boy" and "Mother's" are to be found on every page of the Trademark Registry. Since there have been multiple "Mr. Apple" trademarks registered by the Trademark Office in Class 46, it is only logical to assume that there could be multiple "Miss Chocolate" trademarks as well. No other mark called "Miss Chocolate" could be entitled to identify "candy", however.

The "Miss Chocolate" registration, Number 1,046,953, is singular and does not entitle it's registrant to hold in reserve an unlimited number of other titles of courtesy that are obviously separate from "Miss Chocolate".

As long as a particular title such as "Mr. Chocolate" is not being used in commerce it is available for adoption as an independent trademark.

If the word "apple" can be applied to a trademark to identify a "confection on a stick" as in the case of "Mr. Apple", Reg. No. 796845, then it is equally valid to apply the word "chocolate" to a trademark as "Mr. Chocolate" to identify candy.

Registration No. 796845

SN 201,709. Joe Lowe Corporation, Englewood, N.J. Filed Sept. 11, 1964.

Mr. APPLE

The word "Apple" is disclaimed apart from the mark as shown. The drawing is lined for the colors red and green, but no claim is made to such colors.

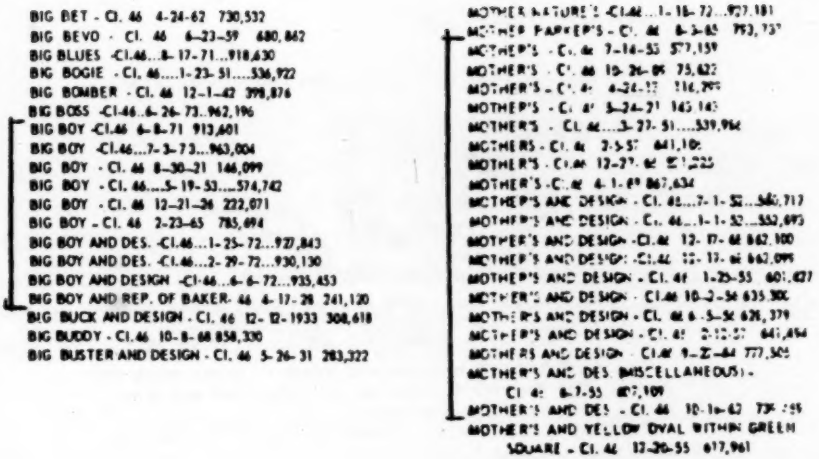
For Frozen Confections on Sticks and Liquid Concentrates for Making the Same.

First use Aug. 28, 1964.

Petitioner's mark

Below are clusters of registered trademarks that are spelled and pronounced exactly alike.

MR. ANGUS AND MR. N AND STEER DES.
Cl. 46....7-20-71....916,830
MR. ANTHONY - Cl. 46 11-21-72 947,474
MR. APPLE - Cl. 46 7-8-58 664,152
MR. APPLE AND DESIGN - Cl. 46 12-13-66 [illegible]
MR. APPLE AND DESIGN - Cl. 46 9-29-64 756,845
MR. APRICOT AND DESIGN - Cl. 46 12-9-63 761,018
"MR. ARTICHOKE" AND DESIGN -
Cl. 46 4-23-63 748,556
MR. AVOCADO - Cl. 46 8-1-72 [illegible]



BIG BET - Cl. 46 4-24-62 730,532
BIG BEVO - Cl. 46 6-23-59 680,862
BIG BLUES -Cl.46...8-17-71...918,630
BIG BOGIE - Cl. 46.....1-23-51....536,922
BIG BOMBER - Cl. 46 12-1-42 399,876
BIG BOSS -Cl.46..6-26-73..962,196
BIG BOY -Cl.46 6-8-71 913,601
BIG BOY -Cl.46....7-3-73...963,004
BIG BOY - Cl. 46 8-30-21 146,099
BIG BOY - Cl. 46.....5-19-53....574,742
BIG BOY - Cl. 46 12-21-26 222,071
BIG BOY - Cl. 46 2-23-65 785,694
BIG BOY AND DES. -Cl.46....1-25-72...927,843
BIG BOY AND DES. -Cl.46....2-29-72...930,130
BIG BOY AND DESIGN -Cl.46...6-6-72...935,453
BIG BOY AND REP. OF BAKER- 46 6-17-28 241,120
BIG BUCK AND DESIGN - Cl. 46 12-12-1933 308,618
BIG BUDDY - Cl.46 10-8-68 858,330
BIG BUSTER AND DESIGN - Cl. 46 5-26-31 283,322

MOTHER NATURE'S -Cl.46...1-18-72...927,181
MOTHER PARKER'S - Cl. 46 8-3-65 793,737
MOTHER'S - Cl. 46 7-14-53 577,159
MOTHER'S - Cl. 46 10-26-05 75,622
MOTHER'S - Cl. 46 4-24-17 116,795
MOTHER'S - Cl. 46 5-24-21 145,143
MOTHER'S - Cl. 46....5-27-51....539,964
MOTHERS - Cl. 46 2-5-57 641,109
MOTHER'S - Cl. 46 12-27-[illegible] [illegible]
MOTHER'S -Cl. 46 4-1-69 867,634
MOTHER'S AND DESIGN - Cl. 46....7-1-52...560,717
MOTHER'S AND DESIGN - Cl. 46...1-1-52....552,093
MOTHER'S AND DESIGN -Cl.46 12-17-68 862,100
MOTHER'S AND DESIGN -Cl.46 12-17-68 862,099
MOTHER'S AND DESIGN - Cl. 46 1-25-55 601,427
MOTHER'S AND DESIGN - Cl.46 10-2-56 635,300
MOTHER'S AND DESIGN - Cl. 46 6-5-56 626,379
MOTHER'S AND DESIGN - Cl. 46 [illegible] 641,454
MOTHERS AND DESIGN - Cl.46 9-22-64 777,505
MOTHER'S AND DES. MISCELLANEOUS -
Cl. 46 6-7-55 607,109
MOTHER'S AND DES. - Cl. 46 10-16-62 [illegible]
MOTHER'S AND YELLOW OVAL WITHIN GREEN
SQUARE - Cl. 46 12-20-55 617,961

Clusters of identical marks called "Mr. Apple", "Big Boy" and "Mother's" as they appear in the Trademark Registry.

It appears that the Trademark Office has registered thousands of marks that are spelled and pronounced exactly alike, such as "Big Boy", "Mother's" and "Mr. Apple", and yet, it has been inferred for the last seven years that the mark "Mr. Chocolate" doesn't have enough of a difference from "Miss Chocolate" to be worth any consideration for registration. This is enough to boggle the imagination.

CERTIFICATE OF SERVICE

The Petitioner, Edward L. Odum, hereby asserts that he has served copies of the foregoing Petition for Writ of Certiorari to the following parties:

Mr. Francis X. Gindhart, Clerk
United States Court of Appeals for the
Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Hon. Charles Fried, Solicitor General

Joseph F. Nakamura,
Office of the Solicitor
P.O. Box 15667
Arlington, Virginia 22215

STATEMENT OF THE CASE

Since there were places for multiple "Mr. Apple" trademarks to be registered by the Trademark Office in Class 46 it stands to reason there must be a place for the singular mark, "Mr. Chocolate", in the natural order of design as an independent registered trademark.

Since there is no other trademark called "Mr. Chocolate" that identifies "candy" or anything else for that matter, the Petitioner's mark is not excluded from registration because it identifies "candy".

There has been widespread adoption and registration of trademarks containing the title "Mr." to precede food products of all sorts. A few examples selected at random are the following:

1. Mr. Applr Reg. No. 664152
2. Mr. Apple Reg. No. 796845
3. Mr. Apple Reg. No. 820378
4. Mr. Apricot
5. Mr. Artichoke
6. Mr. Burger
7. Mr. Chicken
8. Mr. Coffee
9. Mr. Cinnamon
10. Mr. Donut
11. Mr. Bar-B-Q
12. Mr. Pepper

There have been more than two hundred marks registered that begin with the popular title "Mr."

See the many examples listed in Class 46 of the Trademark Registry.

There appears to be a phenomenon in trademarks to give a male image to all such food products identified in this manner.

It is not hard to imagine that, in time, all food commodities, barring none, will be registered in this same popular mode. So far, the multifarious commodity "chocolate" is absent from this long line-up of masculine personifications. "Chocolate" belongs in this particular roll-call as much as any other commodity. It's reserved position is here.

The mark "Miss Chocolate" Reg. No. 1,046,953 does not give a masculine image.

In 1971 the mark "Miss Apple Queen U.S.A." Reg. No. 920829 was registered in just over ten months after filing even though there had been two separate marks called "Mr. Apple" registered before it. According to this precedent the mark "Mr. Chocolate" should have been registered in 1980.

The Petitioner has been denied his Constitutional Rights to protect his particular mark against the likelihood of other marks called "Mr. Chocolate".

Since the mark "Mr. Apple" Reg. No. 664152 was registered to identify "fresh apples" no other mark called "Mr. Apple" could be entitled to identify "fresh apples". But a mark using a different title of courtesy, such as "Miss", to precede the word "apple" is not excluded from identifying "fresh apples" according to Trademark Law. Even the term "Mr. Apple" can be registered again and again as illustrated by the marks "Mr. Apple" Reg. No. 796845 and "Mr. Apple" Reg. No. 820378.

Therefore, since there is no other trademark called "Mr. Chocolate" that identifies "candy" or anything else for that matter, the Petitioner's mark is not excluded from identifying "candy".

The fact that the mark "Miss Apple Queen U.S.A." and the mark "Mr. Apple" Reg. No. 664152 can both identify "fresh apples" proves without a doubt that the goods do not have to be different in these cases. They can be for exactly the same thing.

The Petitioner has been denied the freedom to protect his mark by having it properly registered in the manner of the multiple marks called "Mr. Apple".

The Petitioner's mark has gone unprotected for the past seven years and he has been severely handicapped and constrained because of this fact.

The purpose for the Petitioner's filing for registration in 1979 was to protect his mark against the strong likelihood of others wishing to copy his singular mark "Mr. Chocolate".

The decision of the lower court to disregard the Petitioner's Constitutional Right to protect his singularly appropriate trademark "Mr. Chocolate" by having it properly registered is so erroneous as to call for correction by this court.

The lower court's refusal to apply the prevailing precedent of the registration of the mark "Miss Apple Queen U.S.A." Registration Number 920829, even though multiple registrations of "Mr. Apple" existed beforehand, is so neglectful as to call for correction by this court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted

By: Edward L. Odum

Petitioner

APPENDIX

In The
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2526

Edward L. Odum,
Appellant
versus
United States Patent &
Trademark Office,
Appellee
Decided: February 12, 1986

DECISION

The decision of the U.S. Patent and Trademark Office, Trademark and Appeal Board (board), sustaining the Examiner's refusal to register the mark "Mr. Chocolate" for "candy".

Odum has not shown error in the board's conclusion that the mark "MR. CHOCOLATE" so resembles the registered mark "MISS CHOCOLATE" (Chocolate disclaimed) for mint patties, coconut delights, cherries, peanut crunch, caramel nut clusters and cookies, as to be likely, when applied to Odum's goods (candy) to cause confusion or to cause mistake, or to deceive. See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 1566-67, 223 USPQ 1289-90 (Fed. Cir. 1984): Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F. 2d 669, 671-72, 223 USPQ 1281, 1281-62 (Fed. Cir. 1984). Third party registrations offered by Odum to support registrability are non-probative with respect to the likelihood of confusion determination. Because all other issues raised in Odum's appeal are adequately addressed in the Board's opinion, we affirm on the basis of the board's decision.

The Petitioner's Opinion

The cases: "Martin's Famous Pastry Shoppe, Inc." and "Specialty Brands, Inc." v. "Coffee Bean Distributors, Inc." should have no significance in the present case since they would be secondary to the Petitioner's Constitutional Rights to use and register an undeniably appropriate title "Mr. Chocolate".

The Petitioner filed a reply brief of more than a hundred pages to the Trademark Trial & Appeal Board in December of 1984, but the Board gave it no consideration because they said it was two days late. The brief contained many important issues (including illustrations and exhibits) that have never been addressed by the Board.

The brief was properly mailed to Margaret Laurence of the Trademark Office on December 24, 1984.

All other issues raised in Odum's appeal have not been adequately addressed in the Board's opinion.

The Petitioner is forwarding to the Supreme Court a request for reconsideration that was mailed to the U.S. Court of Appeals for the Federal Circuit. The request was returned to the Petitioner, intact, by the Clerk, Francis X. Gindhart.

A full-size photo-copy of Page 834 from the U.S. Trademark Registry (circa 1980) was included in the request together with other displays and illustrations too large to be contained in a 6 1/8 by 9 1/4 inche format. Full-size photo-copies of the Certificates of Registration for the marks "Mr. Apple" Reg. No. 664152, "Mr. Apple" Reg. No. 796845 and "Miss Apple Queen U.S.A." Reg. No. 920829 were included, also.

The extensive file for Trademark Application Serial No. 243187 contains many important issues never addressed by the Board, especially the one hundred page reply brief that was timely mailed to Margaret Laurence of the Trademark Office on December 24, 1984.

In view of the fact that the three registrations of "Mr. Apple" are spelled exactly the same and pronounced

exactly the same, and the ten registrations of "Big Boy" are all spelled exactly the same, pronounced exactly the same, and all are of the same gender (masculine) and the nineteen registrations of "Mother's" are all spelled exactly the same, pronounced exactly the same, and all are of the same gender (feminine), it is absurd to conclude that the mark "Mr. Chocolate" resembles "Miss Chocolate" so much that registration of it is out of the question. The difference given by gender in the marks "Mr. Chocolate" and "Miss Chocolate" is a major difference that cannot be dismissed in Trademark Law under any circumstances.

As pointed out in a letter the Petitioner mailed to the Examiner on June 15, 1982, there is strong evidence to support the view that the term "chocolate" is appropriately presented in a virile masculine light. (See pages 25-30 of the Petitioner's Appeal Brief.) In some dictionaries, including French and Spanish, the word "chocolate" is designated "masculine" in gender.

This different side of "chocolate" should be allowed to express itself in a trademark. By refusing registration to "Mr. Chocolate" freedom of expression is denied and therefore the Petitioner's Constitutional Rights are denied.